No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The need for plenary review is clear. Respondents do not dispute that Illinois state courts have become the forum of choice for nationwide class actions challenging airline frequent flyer programs, as well as other airline practices. In addition to the five pending class actions noted in the petition (Pet. at 11 nn. 18-20), a sixth, challenging United Airlines' frequent flyer program, was filed just weeks ago.[1]

The pendency of these actions alone warrants immediate review. They involve tens of millions of potential plaintiffs and threaten to impose massive aggregate liabil-

[1] *Greenberg v. United Airlines*, No. 94 CH 499 (In the Circuit Court of Cook County, Illinois) (filed January 18, 1994). That nationwide class action, like this action, challenges capacity control restrictions and other modifications implemented in 1988. That action, like this action, seeks both compensatory and punitive damages for breach of contract and for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

ities on all of the nation's major airlines. Whether Section 1305 of the Airline Deregulation Act ("ADA") preempts such suits is at least as important a question as whether Section 1305 preempts state restrictions on airfare advertising—the issue on which review was granted in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The Illinois Supreme Court's extraordinarily narrow interpretation of the preemptive scope of Section 1305 has effectively foreclosed the possibility of broader interpretations by other courts, because, as the number of cases already filed in Illinois state courts demonstrates, nationwide challenges to frequent flyer programs can and will be filed in Illinois. Thus, all airlines will be forced to conform their frequent flyer programs to Illinois' restrictive laws. As *Amicus* Air Transport Association (representing the nation's major airlines) has noted, if the Illinois Supreme Court's ruling stands, frequent flyer programs may have to be "radically modified or even terminated."[2] That will seriously impede airline competition, because, as respondents concede, frequent flyer programs are a major "marketing tool" that airlines use "to compete . . . for customers". Br. in Opp. at 4.

Review is all the more warranted because the Illinois Supreme Court's decision plainly conflicts with *Morales*, as well as decisions of the Seventh Circuit and other courts of appeals, and threatens to defeat the core objectives of the ADA. Despite respondents' efforts to cloud the issue, the Illinois Supreme Court declined to apply Section 1305 for two reasons, and two reasons only: (i) the court did not consider frequent flyer programs "essential" to airline operations; and (ii) a damage award, as

[2] *See* Motion for Leave to File Brief Amicus Curiae of Air Transport Association of America in Support of Petitioner, at (unnumbered) p. 3. As the accompanying brief notes, at 7, as a direct result of the decision below, all the major airlines "are under enormous pressure to operate their frequent flyer programs in accordance with the particular requirements of Illinois law and the NAAG Guidelines, to which Illinois is a signatory."

opposed to injunctive relief, would not directly regulate airline conduct. Both components of the Illinois Supreme Court's analysis restrict the scope of Section 1305 in ways that conflict directly with *Morales* and the rulings of appeals courts. The decision of the Illinois Supreme Court also thwarts Congress's central goal of encouraging innovative competition and "ensur[ing] that States would not undo federal deregulation with laws of their own." *Morales*, 112 S. Ct. at 2034.

A. The Decision Below Conflicts With Morales In A Way That Merits Immediate Review.

1. The linchpin of respondents' argument is that no ruling can conflict with *Morales* so long as "the lower court applies *Morales*' analytical framework to facts not considered in *Morales*." Br. in Opp. at 11. That argument is both irrelevant and wrong.

It is irrelevant because the Illinois Supreme Court did not apply "*Morales*' analytical framework." The critical flaw in respondents' argument is that respondents, like the Illinois court, entirely ignored what *Morales* described as the "key phrase" in Section 1305: "relating to." 112 S. Ct. at 1036. Drawing from precedents construing the cognate ERISA preemption provision, *Morales* made clear that Section 1305 has an "expansive sweep," is "conspicuous for its breadth," and preempts all state laws having a "connection with or reference to" airline rates, routes or services. *Id.* at 2037 (quotations omitted). Because Congress chose the broad "relating to" language, Section 1305 preempts state laws affecting rates, routes or services "even if the effect is only indirect." *Id.* at 2038.

Respondents seek to rehabilitate the Illinois Supreme Court's decision by diverting attention from this "key phrase," and focusing instead on *Morales*' dictum about the outer boundaries of Section 1305. *See* Br. in Opp. at 9-10, 11-12, 13-14. That gambit is hardly surprising, but whatever the scope of the dictum in *Morales*, the

Illinois Supreme Court's analysis cannot be reconciled with the holding in *Morales*.

2. The Illinois Supreme Court's focus on whether frequent flyer programs are "essential" to airline operations directly contradicts the holding of *Morales*. The proper question under *Morales* is whether the state law at issue "relates" to rates, routes or services. Many aspects of airline operations will "relate to" airline rates, routes or services, and thus be preempted under *Morales*, whether or not they are essential—as the Illinois Supreme Court recognized when it preempted respondents' claims for injunctive relief despite its belief that frequent flyer programs are not essential. Frequent flyer programs certainly "relate to" or have a "connection with" airline rates, routes or services. The essence of such programs is the purchase of air transportation (an airline's core "service"), for particular mileage credits ("rates"). Notwithstanding their attempt to run away from the allegations in their complaints, respondents simply cannot deny that their claims challenge the institution of capacity control restrictions limiting the number of seats available for passengers who wish to pay for travel with frequent flyer credits. Thus, their claims relate to the purchase of air transportation services even more directly than did the claims at issue in *Morales*.

3. The Illinois Supreme Court's focus on the form of relief sought by plaintiffs is also foreclosed by *Morales*. Notwithstanding Section 1305's undisputed application to all "laws" relating to rates, routes, or services, respondents contend that the Illinois Supreme Court properly afforded different treatment to damages and injunctive claims. Respondents specifically argue that preemption is inappropriate because a damages award—unlike an injunction—does not actually prescribe rates, routes or services. Br. in Opp. at 14. But this is precisely the analysis *rejected* in *Morales*. As this Court made clear, such an interpretation "reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States

to *regulate* rates, routes, and services." 112 S. Ct. at 2037-38 (emphasis in original).

4. Respondents are in any event wrong that this Court need not review any decision that purports to follow the "analytical framework" of *Morales*. That suggestion is implausible in light of this Court's experience with the cognate ERISA preemption provision. *See* Pet. at 19-20 & n.29. As that experience teaches, and as *Morales* itself indicated, 112 S. Ct. at 2040, any preemption provision that sweeps as broadly as does Section 1305 will require periodic clarification by this Court, particularly when it is applied in important new contexts. Review is warranted here for precisely this reason. Frequent flyer programs are central to airlines' efforts to compete for passengers. The pendency in Illinois of numerous nationwide class actions challenging frequent flyer programs—with more certain to follow—raises the specter of massive aggregate liabilities, and threatens drastic curtailment of such programs.

5. Additionally, respondents are wrong that application of Section 1305 would leave them without a remedy. As this Court made clear in *Morales*, "Section 1305 does not give the airlines *carte blanche* to lie and deceive consumers," because the DOT has ample authority to regulate misleading or deceptive practices of the kind respondents allege here. 112 S. Ct. at 2040. The congressional decision to vest DOT with authority in this area is appropriate because DOT "is equipped, as courts are not, to survey the field nationwide and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 114 S. Ct. 855, 863 (1994).

B. The Decision Below Conflicts With The Seventh Circuit And With Other Federal Courts.

1. Respondents dismiss all of the conflicts noted in the petition (Pet. at 18-26) with the incorrect and irrelevant observation that "The Cases Relied On By American Do Not Address Federal Pre-emption With Respect To Fre-

quent Flyer Programs." Br. in Opp. at 15; *id.* at 7, 16.[3] As we noted *supra*, it is unlikely there will be *additional* conflicts regarding frequent flyer programs because future challenges to such programs will be filed in Illinois. The fact that the decision below makes Illinois statutory and common law the *de facto* national standard for frequent flyer programs would thus be ample reason to grant certiorari even if that decision did not conflict with any other decision.

Furthermore, the decision below *does* conflict with other decisions, and those conflicts are much more important than mere conflicts between the *results* of two decisions involving identical facts. They are conflicts between the *tests* used by different courts to decide the scope of preemption under Section 1305, and those tests have been applied and will be applied regardless of the varying facts of individual cases. It is indisputable that application of the *test* used by Seventh Circuit, for example, would have produced a different *result* if applied to the facts of this case.[4]

2. Respondents' only answer to the plain conflict between the Ninth Circuit's decision in *West*,[5] which pre-

[3] The observation is incorrect because, as we noted in our petition (at 19), and as Justice McMorrow noted in her dissent (*see* Pet. App. 14a), there is a square conflict between the decision below and *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. Sept. 18, 1992), which preempted state consumer fraud and breach of contract claims seeking damages for alleged failure to provide adequate notice of changes in the terms of a frequent flyer program. The fact that preemption was not the "only" basis for dismissal in *Schaefer*, Br. in Opp. at 16, n.7, does not eliminate that conflict.

[4] The test used by the Seventh Circuit in *Statland v. American Airlines, Inc.*, 998 F.2d 539, *cert. denied*, 114 S. Ct. 603 (1993), and *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (1989), *cert. denied*, 495 U.S. 919 (1990), is discussed in the petition at 21-22, 24-25. Justice McMorrow noted in dissent that the result in this case would be different under the "rationale" used in *Statland*. Pet. App. at 14a, 16a.

[5] *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (1993), *cert. denied*, 62 U.S.L.W. 3551 (1994).

empted claims for punitive damages, and the decision below, which did not, is to describe that conflict as a "red herring" because the decision below does not separately "address" the claims for punitive damages. Br. in Opp. at 21. It is undisputed, however, that petitioner moved to dismiss the punitive claims on preemption grounds and that the Illinois Supreme Court denied that motion. Indeed, Justice McMorrow's dissent repeatedly stressed her disagreeement with the majority's decision to allow claims for "both actual and punitive damages" to proceed. Pet. App. at 11a; *id.* at 12a, 13a. There is thus a square conflict on this important point.

This case is a much stronger candidate for plenary review than was *West*. It raises the same conflict regarding the availability of punitive damages, and broader questions regarding the scope of Section 1305 as well. It directly affects *all* the major airlines and *millions* of class members, not just one overbooked passenger. And it does not depend on the interpretation of a particular federal regulation unique to overbooking. *See* Petition at 26.

3. Respondents continue to ignore the crucial fact that they alleged the *same* statutory and common law causes of action, based on the same facts, to support their claims for injunctive relief, which were preempted, *and* to support their claims for compensatory and punitive damages, which were not. Because preemption obviously turned on the form of relief requested, respondents are forced to argue that the test for preemption adopted in *Morales* permits courts to draw a "distinction between damage claims and claims for injunctive relief." Br. in Opp. at 14. But *Morales* noted that ERISA has been interpreted to preempt claims for damages, and held that Section 1305 should be interpreted to have the same scope. *See Morales*, 112 S. Ct. at 2039; Pet. at 15, and n.22. Thus, the decision below is flatly inconsistent with *Morales*.

Even if *Morales* had not made clear that preemption *under Section 1305* does not turn on the form of relief

requested, this Court made clear in *Cipollone, Garmon,* and *Ouellette*[6] that the form of relief is generally irrelevant to preemption analysis. Respondents rely on other cases, cited by the *dissent* in *Cipollone,* in which the Court held that the form of relief was relevant in light of the legislative history or the congressional intent underlying the particular federal laws at issue in those cases. Thus, if *Morales* does not settle the question under Section 1305, as we contend, then it is clearly important for the Court to decide whether Section 1305 is governed by the general rule, or falls within the exceptions to that rule.

4. Respondents argue that there is no conflict with *Hodges v. Delta Airlines, Inc.,* 4 F.3d 350 (5th Cir. 1993) because, in their view, "the *Hodges* court's analysis . . . supports *Wolens.*" Br. in Opp. at 19. This argument requires respondents to contend that petitioner "deceptively" described *Hodges* as preempting claims relating to "the contractual arrangement between the airline and the user of the service" at issue, Br. in Opp. at 20, because their complaints allege that the services at issue are part of the bargained for contractual arrangement between American and its frequent flyer members. But it is *respondents* who elide the relevant language from *their* quotation of *Hodges.* After quoting from *Hodges* to the effect that the type of "services" subject to preemption under Section 1305 will "generally represent a bargained-for or anticipated provision of labor from one party to another," Br. in Opp. at 19, respondents continue the quote but omit the very next sentence, in which the *Hodges* court said that "[i]f the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the *contractual arrangement* between the airline and the user of the services." 4 F.3d at 354 (emphasis added). Thus, there is clearly a conflict between the decision below and the *Hodges*

[6] *Cipollone v. Liggett Group, Inc.,* 112 S. Ct. 2608 (1992); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); Pet., n.23.

court's analysis, because *Hodges* would clearly regard the air travel services provided to frequent flyers as part of the baragin or contractual arrangement between American and its frequent flyer users.[7]

5. Respondents argue that the "essential element" test used by the court below was only "a factor" in that court's analysis. Br. in Opp. at 12. Of course, the court below mentioned only two factors: "essentiality" and the relief requested. In any event, a test which incorporates "essentiality" as a factor in applying Section 1305 conflicts with tests in which essentially is not a factor at all. The question is not whether a factor is itself dispositive, but whether it is consistent with the congressional intent underlying Section 1305, and on that question, there is plainly a conflict between the decision below and other courts. *See* Pet. at 20-24.

C. The Decision Below Threatens The Core Objectives Of The Airline Deregulation Act.

Respondents completely miss the significance of the Department of Transportation's ruling. First, DOT determined that the institution of capacity ocntrols did not violate federal consumer protection laws applicable to airlines. The Illinois Supreme Court has concluded that the institution of capacity controls can violate analogous state consumer protection laws. There is thus a clear conflict between federal and state policy that provides an additional reason for plenary review. Second, respondents are simply wrong to contend that DOT's order says nothing about its view of the preemptive scope of Section 1305. The complainants argued in that proceeding that uniform federal rules governing blackout dates and ca-

[7] In addition, providing air transportation in exchange for frequent flyer credits (*i.e.,* providing "the transportation itself," to quote from *Hodges,* 4 F.3d at 354), is surely a more important part of the economic bargain between the passenger and the airline than providing "food and drink," or any of the other "services" that *Hodges* said would be within the preemptive scope of Section 1305.

pacity controls were necessary because without them airlines would be subjected to restrictive and conflicting state standards. The DOT rejected this argument because, in its view, Section 1305 would premept such state laws, even if enforced in common law breach of contract actions, thereby obviating the risk of conflicting state law obligations.[8]

CONCLUSION

The petition should be granted, and the judgment of the Illinois Supreme Court should be summarily reversed. Alternatively, the case should be set for plenary consideration.

Respectfully submitted,

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[8] American's suits against coupon brokers have nothing to do with the issues presented here. None of those cases involved a dispute between an airline and a passenger. In none of those cases was the scope of Section 1305 raised or at issue. The claims in those cases had no relation to airline rates or services, except that airline services were the object of willful theft and misappropriation—often accomplished by illegal means such as manipulating American's computer records or counterfeiting documents. Those claims did not affect, directly or indirectly, the rates or services American offers.